IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

1. STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA, Plaintiff, v. 1. TYSON FOODS, INC., 2. TYSON POULTRY, INC., 3. TYSON CHICKEN, INC., 4. COBB-VANTRESS, INC., 5. AVIAGEN, INC., 6. CAL-MAINE FOODS, INC., 7. CAL-MAINE FARMS, INC., 8. CARGILL, INC., 9. CARGILL TURKEY PRODUCTION, LLC, 10. GEORGE'S, INC., 11. GEORGE'S FARMS, INC., 12. PETERSON FARMS, INC., 13. SIMMONS FOODS, INC., and 14. WILLOW BROOK FOODS, INC., Defendants.	)	Case No. 4:05-cv-00329-JOE-SAJ

PLAINTIFF'S RESPONSE IN OPPOSITION TO "TYSON CHICKEN, INC.'S MOTION TO DISMISS COUNTS 4, 5, 6 AND 10 OF THE FIRST AMENDED COMPLAINT UNDER THE POLITICAL QUESTION DOCTRINE"

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COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), by and through counsel, and respectfully submits that Defendant Tyson Chicken, Inc.'s Motion to Dismiss Counts 4, 5, 6 and 10 of the First Amended Complaint Under The Political Question Doctrine ("Tyson Chicken Motion") is not well-taken and should be denied.[1]

I. Introduction

The State has brought suit against the Poultry Integrator Defendants, including Defendant Tyson Chicken, Inc. ("Defendant Tyson Chicken"), to hold them accountable for the past and continuing injury and damage to those portions of the Illinois River Watershed ("IRW") located in Oklahoma caused by the improper storage, handling and disposal of poultry waste at poultry operations for which they are legally responsible. This improper storage, handling and disposal of poultry waste has occurred, and continues to occur, both in Oklahoma and in Arkansas.

The State's First Amended Complaint ("FAC") describes in great detail the Illinois River Watershed, *see* FAC, ¶¶ 22-31, the Poultry Integrator Defendants' domination and control of the actions and activities of their respective growers, *see* FAC, ¶¶ 32-45, the Poultry Integrator Defendants' poultry waste generation, *see* FAC, ¶¶ 46-47, the Poultry Integrator Defendants' improper poultry waste disposal practices and their impact, *see* FAC, ¶¶ 48-64, and the reason for this lawsuit, *see* FAC, ¶¶ 65-69.

The basis of the Poultry Integrator Defendants' legal liability is set forth in the State's 10-

[1] This Memorandum in Opposition is intended to respond not only to the Tyson Chicken Motion, but also to all of the other Poultry Integrator Defendants which have joined and / or adopted the Tyson Chicken Motion.

count FAC. Count 1 asserts a cost recovery claim under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). *See* FAC, ¶¶ 70-77. Count 2 asserts a natural resource damages claim under CERCLA. *See* FAC, ¶¶ 78-89. Count 3 asserts a citizen suit claim under the Solid Waste Disposal Act. *See* FAC, ¶¶ 90-97. Count 4 alleges that the Poultry Integrator Defendants' conduct constitutes a private and public nuisance under applicable state law. *See* FAC, ¶¶ 98-108. Count 5 alleges that the Poultry Integrator Defendants' conduct constitutes a nuisance under applicable federal law. *See* FAC, ¶¶ 109-18. Count 6 alleges that the Poultry Integrator Defendants' conduct constitutes a trespass under applicable state law. *See* FAC, ¶¶ 119-27. Count 7 alleges that the Poultry Integrator Defendants, by and through their wrongful poultry waste disposal practices, have caused pollution of the land and waters within the IRW in Oklahoma in violation of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1. *See* FAC, ¶¶ 128-32. Count 8 alleges that the Poultry Integrator Defendants, by and through those [wrongful waste disposal] practices that occurred in Oklahoma, have caused run-off, discharges and releases of poultry waste to the waters of the IRW in Oklahoma in violation of Oklahoma Registered Poultry Feeding Operations Act and its accompanying regulations. *See* FAC, ¶¶ 133-36. Count 9 alleges that the Poultry Integrator Defendants, by and through those [wrongful waste disposal] practices that occurred in Oklahoma, have caused run-off, discharges and releases of poultry waste to the waters of the IRW in Oklahoma in violation of the regulations of the Oklahoma Concentrated Feeding Operation Act. *See* FAC, ¶¶ 137-39. And count 10 asserts a claim against the Poultry Integrator Defendants for unjust enrichment / restitution / disgorgement. *See* FAC, ¶¶ 140-47.

The Tyson Chicken Motion seeks dismissal of counts 4, 5, 6 and 10 of the FAC on the ground that the State's common law claims for nuisance, trespass and unjust enrichment present

nonjusticiable political questions in violation of the separation of powers. Tyson Chicken Motion, pp. 2 & 3. Defendant Tyson Chicken relies solely on the case of *Connecticut v. American Electric Power Company, Inc.*, 2005 WL 2347900, (S.D.N.Y. Sept. 22, 2005) (notice of appeal filed Sept. 28, 2005), in support of its argument, and ignores the insurmountable factual differences between it and the State's case against the Poultry Integrator Defendants herein. Tyson Chicken Motion, pp. 5-7. Specifically, Defendant Tyson Chicken's motion should be denied because: (1) the State's common law claims do not present the Court with nonjusticiable political questions; and (2) the facts in *American Electric Power* are clearly distinguishable from the present case.

II. Legal Standard

Defendant Tyson Chicken has asserted that this Court lacks jurisdiction over the subject matter, *see* Tyson Chicken Motion, p.1 *citing* Fed. R. Civ. P. 12(b)(1), alleging that the State's common law claims raise a "political question." In so asserting, Defendant Tyson Chicken has confused the concepts of subject matter jurisdiction and justiciability. The concepts are distinct and the differences "significant." *See Baker v. Carr*, 369 U.S. 186, 700 (1962). This case plainly raises no issues of subject matter jurisdiction. Accordingly, the issue presented by the Tyson Chicken Motion is the justiciability of certain of the claims. To determine if a case is justiciable in light of the political question doctrine, the Court must decide "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker*, 369 U.S. at 198.

III. Argument

A. The State's common law claims do not present the Court with nonjusticiable political questions

1. The political question doctrine is narrow in its application

The "[p]olitical question doctrine takes its name from the conclusion that in the separation of federal powers, certain matters are confined to the political branches." Wright, Miller & Cooper, 13A *Federal Practice & Procedure* § 3534.1. "[It] excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986).

The United States Supreme Court in *Baker*, *supra*, analyzed cases involving foreign relations, dates of duration of hostilities, validity of enactments and the status of Indian tribes, as being representative of those cases in which political questions arise in an effort to extrapolate from such cases the common analytical threads which make up the political question doctrine. The *Baker* Court concluded:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.

Baker, 369 U.S. at 217.

"The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker,* 369 U.S. at 210. "A question is political when its resolution has been committed by the Constitution to another branch of government." *United States-South West Africa/Namibia Trade and Cultural Council v. U.S. Department of State*, 90 F.R.D. 695, 698 (D.D.C. 1981) (*citing Baker*).

Importantly, "[t]he Supreme Court has noted that the 'narrow categories of "political questions"' defined in *Baker* should not be transformed into 'an ad hoc litmus test of this Court's reactions to the desirability of and need for judicial application of constitutional or statutory standards to a given type of claim.' The mere fact that a decision 'may have significant political overtones' does not allow a court to avoid deciding. So long as the nature of the inquiry is familiar to the courts, the fact that standards needed to resolve a claim have not yet been developed does not make the question a non-justiciable political one." *Los Angeles County Bar Association v. Eu*, 979 F.2d 697, 702 (9th Cir. 1992) (citations omitted).

Article III of the U.S. Constitution commits the adjudication of cases and controversies to the judiciary. U.S. Const., Art. III, § 2. Moreover, it is not within the province of the United States Congress to adjudicate claims under the common law. This is strictly the function of the courts. *See* U.S. Const., Art. I § 1; U.S. Const. Art. III § 2 (defining the powers of Congress and excluding from those powers the authority granted to the judiciary to adjudicate cases and controversies). "'The Judicial Power' created by Article III, § 1, of the Constitution is not whatever judges choose to do, or even whatever Congress chooses to assign them. It is the

power to act in the manner traditional for English and American courts." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (citations omitted).

Common law torts rarely present nonjusticiable political questions. *See, e.g., McKay v. United States*, 703 F.2d 464, 470 (10th Cir. 1983) (suit for damage to land caused by nearby nuclear weapons plant does not present a political question); *Alperin v. Vatican Bank*, 410 F.3d 532, 555 (9th Cir. 2005) (holocaust survivors' claims for unjust enrichment and restitution against Vatican Bank arising from profits obtained through looted assets and slave labor did not present the court with nonjusticiable political questions); *Owens v. Republic of Sudan*, 374 F.Supp.2d 1, 28 (D.D.C. 2005) (because coordinate branches revoked sovereign immunity of the Republic of Sudan, plaintiffs' claims against Sudan for intentional infliction of emotional distress, personal injury and loss of consortium did not present any nonjusticiable political questions); *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 103 F.Supp.2d 134, 146 (N.D.N.Y. 2000) (Canada's common law fraud claims against cigarette manufacturer did not constitute nonjusticiable political questions); and *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 49 (2d Cir. 1991) ("fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question").

As recognized by the Tenth Circuit Court of Appeals in *Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1386 (10th Cir. 1997), the fact that the Court on previous occasions has heard and determined substantially the same issues is sufficient to defeat a challenge that the matters under consideration involve nonjusticiable political questions. Common law nuisance, trespass and unjust enrichment claims are often litigated in federal court. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (Clean Water Act did not

preclude Vermont landowners' nuisance suit under the common law of New York against New York defendant); *Moore v. Texaco, Inc.*, 244 F.3d 1229 (10th Cir. 2001) (successor landowner pursued to conclusion his Oklahoma common law negligence, trespass, public and private nuisance and unjust enrichment claims against predecessor for pollution of the property); *Tosco Corp. v. Koch Industries, Inc.*, 216 F.3d 886 (10th Cir. 2000) (former oil refinery owner could press both Oklahoma common law nuisance claim and CERCLA contribution claim against current and former refinery owners); *Scheulfler v. General Host Corp.*, 126 F.3d 1261 (10th Cir. 1997) (plaintiffs obtained jury verdict on their Kansas common law claims for trespass and private nuisance in diversity action against mining operator responsible for polluting a fresh water aquifer underlying their property and preventing them from raising irrigated crops); *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993) (State of Colorado's earlier parens patriae action under CERCLA and common law nuisance, strict liability in tort, and negligence theories which resulted in Consent Decree for natural resource damages, response costs and costs of continuing oversight of the mine was not res judicata as to private plaintiffs' claims for private property damage and economic losses sustained from the hazardous waste which the mining operation produced); *Technical Rubber Co. v. Buckeye Egg Farm, L.P.*, 2000 WL 782131 (S.D. Ohio 2000) (Clean Water Act did not preclude plaintiffs' common law nuisance, trespass and negligence claims arising from defendant's mismanagement of the storage and spreading of manure, the storage of ammonia and the improper disposal of chicken carcasses); and *Portage County Board of Commissioners v. City of Akron*, 12 F.Supp.2d 693 (N.D. Ohio 1998) (Clean Water Act did not preclude county's common law action against upstream City for negligent pollution of waterways). Simply put, common law nuisance, trespass and unjust enrichment claims have been around for centuries and their contours are well

known by the judiciary. Indeed, this Court was quite recently called upon to handle a case against the poultry industry that asserted many claims similar to the ones being asserted here. *See City of Tulsa v. Tyson Foods, Inc.*, Case No. 01-CV-0900-B(C), N.D. Okla.

When deciding whether issues present political questions, the doctrine should be construed narrowly. *See Biton v. Palestinian Interim Self-Government Authority*, 310 F.Supp.2d 172, 185 (D.D.C. 2004); *Nixon v. U.S.*, 938 F.2d 239, 258 & n.11 (D.C. Cir. 1991). "Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990).

2. The State's common law claims do not implicate the third *Baker* factor

Relying on *Connecticut v. American Electric Power Co.*, 2005 WL 2347900, (S.D.N.Y. Sept. 22, 2005), Defendant Tyson Chicken argues that the State's common law claims for nuisance, trespass and unjust enrichment are political questions based on the third *Baker* factor, *i.e.*, "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . ." *See Baker*, 369 U.S. at 217. Defendant Tyson Chicken argues that the President and Congress must first make the "complex initial policy decisions necessary to expand the Clean Water Act beyond its current scope" before this Court could hear and resolve the State's common law claims. Tyson Chicken Motion, p. 7. Resolution of the issues before this Court, however, does not necessitate any such "complex initial policy decisions." The Supreme Court has set forth the analytical framework for evaluating the viability of common law claims under the Clean Water Act ("CWA"). For example, in *International Paper*, the Supreme Court plainly held that with respect to point source pollution, "nothing in the [CWA] bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State."

107 S.Ct. at 814 (emphasis in original). Likewise, utilizing the *International Paper* analytical framework and for the reasons set forth in the "State of Oklahoma's Memorandum in Opposition to 'Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint'" (and incorporated herein by reference), nothing in the CWA precludes common law claims under affected-state law as to non-point source pollution.

Accordingly, the State's common law claims for nuisance, trespass and unjust enrichment simply do not present separation of powers concerns. *See Biton*, 310 F.Supp.2d at 184; *Klinghoffer*, 937 F.2d at 49. The fact that this Court and others like it have resolved through the years substantially the same common law claims as presented herein disproves any notion that the standards governing such cases cannot be judicially discovered or managed. *See Mescalero Apache Tribe*, 131 F.3d at 1386.

In order "to curtail Defendants' contribution to global warming" in *American Electric Power*, plaintiffs requested the district court to enter "an order . . . enjoining each of the Defendants to abate its contribution to the [public] nuisance [of global warming] by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade." 2005 WL 2347900, *4. Plaintiffs further represented that "the specified reductions they seek 'will contribute to a reduction in the risk and threat of injury to the plaintiffs and their citizens and residents from global warming.'" *American Electric Power*, 2005 WL 2347900, *4. The *American Electric Power* Court responded to the plaintiffs' elaborate request for relief:

> The scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation. Plaintiffs ask this Court to cap carbon dioxide emissions and mandate annual reductions of an as-yet-unspecified percentage. State Compl., Prayer for Relief b. Such relief would, at a minimum, require this Court to: (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction

> to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security – all without an "initial policy determination" having been made by the elected branches.

2005 WL 2347900, *6 (emphasis added).

Obviously, the *American Electric Power* Court's response to the plaintiffs' prayer for relief is unique to that case. In the State's action against the Poultry Integrator Defendants, the State's prayer for relief is quite different from the *American Electric Power* plaintiffs' prayer. The State requests monetary damages, a declaration of defendants' liability for future damages, abatement of the nuisance, remediation, costs, restitution and disgorgement of all gains, exemplary damages, statutory penalties, prejudgment interest, attorneys fees and costs of suit. FAC, pp. 34-35.

B. *American Electric Power* is neither controlling nor persuasive in the instant action

The facts in *American Electric Power* are clearly distinguishable from the present case. Plaintiffs in *American Electric Power*, who claimed "to represent the interests of more than 77 million people and their related environments, natural resources, and economies," brought an action against a number of power companies to abate, what they refer to, as "the public nuisance" of "global warming." 2005 WL 2347900, *1. In addition to finding that plaintiffs' prayer for carbon dioxide emission caps, annual reductions in those caps and a timetable for completion encroached upon the political branches, the *American Electric Power* Court, after first recapping the many steps that Congress and the President had already taken with respect to global warming, *see* 2005 WL 2347900, *2-3, found it impossible to strike the appropriate balance "between interests seeking . . . to reduce pollution rapidly . . . and interests advancing . . .

industrial development . . ., together with the other interests involved, . . . without an 'initial policy determination' first having been made by . . . Congress and the President." 2005 WL 2347900, *5.

"Climate change raises important foreign policy issues, and it is the President's prerogative to address them." *American Electric Power,* 2005 WL 2347900, *7. The Court confirmed its initial impression that such matters were for the political branches by recounting "[t]he explicit statements of Congress and the Executive on the issue of global climate change in general and their specific refusal to impose the limits on carbon dioxide emissions Plaintiffs now seek to impose by judicial fiat." *American Electric Power,* 2005 WL 2347900, *7.

> Because resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests, "an initial policy determination of a kind clearly for non-judicial discretion" is required. *Vieth*, 541 U.S. at 278 (*quoting Baker*, 369 U.S. at 212). . . . Thus, these actions present non-justiciable political questions that are consigned to the political branches, not the Judiciary.

American Electric Power, 2005 WL 2347900, *7.

Defendant Tyson Chicken's attempt to analogize the State's case to the plaintiffs' case in *American Electric Power* fails. The State's common law claims for local water pollution do not seek to abate global pollution problems that involve foreign policy and national security interests. Furthermore, the relief sought by the State is not legislative in nature, but consistent with the typical relief granted at common law in nuisance, trespass and unjust enrichment for many centuries now. In sum, such claims are clearly not non-judiciable political questions. *See, e.g., Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496 (1971) (noting the justiciability of controversies "between a State and citizens of another state seeking to abate a nuisance that exists in one State yet produces noxious consequences in another," but ultimately denying Ohio's

motion for leave to file complaint in Supreme Court without prejudice to its right to commence other appropriate judicial proceedings).

IV. Conclusion

WHEREFORE, premises considered, Tyson Chicken, Inc.'s Motion to Dismiss Counts 4, 5, 6 and 10 of the First Amended Complaint Under The Political Question Doctrine and Integrated Opening Brief in Support should be denied.

Respectfully submitted,

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